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Personal injury: Caught in the act

Legal Update Specialist

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Brent McDonald *considers the high cost of exaggeration & fraud*

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In Brief

· *Owens v Noble*: the Court of Appeal considered the circumstances in which it can be right to revisit the assessment of quantum if evidence emerges of fraud on the part of claimants.

· *Kmiecic v Isaacs*: Health & safety breaches, employers' liability.

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Mark Noble was seriously injured when his motorcycle collided with a car driven by the defendant. Liability was admitted. At an assessment hearing in 2008 the claimant gave evidence that he remained dependent on crutches and a wheelchair, would never work again, and needed daily care and assistance. Damages were assessed by the judge in the sum of just under £3.4m.

By autumn 2008 the defendant's insurers received confidential information that the claimant had exaggerated his claim and as a result undertook covert surveillance on seven occasions, each time filming for several hours. The insurers alleged that the films showed the claimant walking without the aid of crutches or a stick, stretching and bending without difficulty, driving a dumper truck and carrying out activities such as sawing wood.

The defendant's insurers applied for and obtained an injunction restraining Mr Noble from spending the rest of his damages and gave an undertaking to bring an appeal out of time. The allegations of exaggeration were, as the Court of Appeal observed "hotly contested" (*Owens v Noble* [2010] EWCA Civ 224, [2010] All ER (D) 87 (Mar)). The claimant denied any deception. His riposte was that he had good days and bad days and could only do the things shown in the film on his good days.

Smith LJ observed that there was an inconsistency between two lines of authority. *Ladd v Marshall* [1954] 1 WLR 1489, [1954] 3 All ER 745 suggested that, where fresh evidence was properly admitted and it appeared to the court that it might have had an important effect on the trial, the right course was to send the case back for re-trial. This was so even if the new evidence suggested that the court had been deceived. However, in *Jonesco v Beard* [1930] AC 298, [1930] All ER Rep 483 the House of Lords had said that if it were alleged that a plaintiff had deliberately misled the judge below, the proper course was to start a new action based on the allegations of deceit.

True principle

In her ladyship's opinion, the true principle established by *Jonesco* was that the court would only allow the appeal and order a re-trial where the fraud was either admitted or the evidence of it was incontrovertible. In any other case the issue of fraud had to be determined before the judgment of the

court below could be set aside. There might be exceptions to that general rule as, for example, where there would be no injustice and good policy grounds for ordering a re-trial.

The video evidence was sufficiently cogent that it was possible, but not incontrovertible, that a judge would find that the claimant had deceived the court. It would be wrong and unfair for the claimant for the award to be set aside unless and until fraud had been proved. The best course was to utilise CPR 52.10(2)(b), which allowed an appellate court to "refer any claim or issue for determination by the lower court" and send the issue of fraud back to a High Court judge for determination. Subject to the views of the parties, this should be before the original judge who could be expected to recall the case.

Value for money

Given the relatively low cost of surveillance in relation to the sums which may be at stake, the temptation to revisit a claimant who may be feeling better once litigation is behind him, in the hope of obtaining damaging evidence, must be high. As a result of this decision, one may see routine surveillance of claimants following settlement or judgment in claims where significant sums have been awarded, especially where one side retains suspicions or even a grudge. The author has spoken to several insurers who have expressed keen interest in the idea already.

Breach of statutory duty

In *Kmiecic v Isaacs* [2010] EWHC 381 (QB), [2010] All ER (D) 128 (Mar) the High Court was asked to determine yet another tricky question arising out of health and safety legislation.

The claimant had been employed as a casual labourer by a building contractor named Mr Sniegula, who traded under the name of Armag Decoration. In June 2006 they were repairing a leaky garage roof at residential premises in Hampstead. The claimant was standing on a ladder belonging to the householder, holding a roll of roofing material. He intended to pass the roll up to a colleague on the roof of the garage. As he did so, the ladder toppled. He fell approximately 1.5m to the ground and suffered permanent injury.

At the time of the accident, the claimant said nothing of this to the householder, one Mrs Isaacs, on the instruction of Mr Sniegula. Mrs Isaacs only learned of the accident some months later.

When the claimant came to sue it was discovered that Mr Sniegula was uninsured. The claimant therefore decided to proceed against Mrs Isaacs. He claimed breach of the Work at Height Regulations 2005 (WaH Regulations) (SI 2005/735), the Construction (Health, Safety and Welfare) Regulations 1996 (SI 2007/320) (Construction Regulations) and the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) (PUWER). For good measure, negligence, breach of the Occupiers' Liability Act 1957 and breach of bailment were also alleged (although the last two allegations were eventually withdrawn).

It was common ground that the ladder was an obviously unsafe way of gaining access to the garage roof. It was too short and the surface on which it was standing was not level.

For the claimant

The claimant's case was that on the day before the accident he visited the site with his employer. There was a stepladder inside the garage which he was told by Mr Sniegula to use to get onto the roof. He responded that the ladder was too short and they would need longer ladders. Mr Sniegula suggested that they use an upstairs window to get access, and the claimant had then proceeded to walk through the house and gain access in this way.

When the claimant attended the next day he said that he made his way to the upstairs bedroom but found a boy asleep in the room. He quietly unlocked the window, placed a blowtorch on the roof and then made his way back outside. On his way down he said he met Mrs Isaacs who shouted at him. He was given to understand that he should not go into the bedroom. The claimant phoned Mr Sniegula. After speaking to the defendant his employer told him that Mrs Isaacs would not let them use the bedroom window to gain access as her son was sleeping in the room. Mr Sniegula refused the claimant's request to bring a proper ladder and told the claimant to use the defendant's ladder, even though the claimant pointed out that it was too short. The claimant gave evidence that Mr Sneigula informed him that Mrs Isaacs was insisting that they use the ladder.

Mrs Isaacs claimed to have no recollection of any of these events. She said that she would only have allowed access through the house if it were the only way available and provided they took their shoes off. She said she would have needed to be satisfied the work was so urgent that it warranted waking her son up, which it was not. Her case was that if the ladder had been used it was without her knowledge or permission.

After the accident, on the Monday Mr Sniegula eventually provided a longer ladder to allow the job to be completed. It was accepted that, even then, the system used remained unsafe.

Account

Swift J held that although the defendant had not given a frank account of what happened, she was satisfied that no discussion had taken place as to the manner in which the roof was to be accessed on the day before the accident.

Mrs Isaacs had not agreed that the window should be used to gain access to the roof for the purposes of carrying out the work. While the judge accepted that the claimant had encountered Mrs Isaacs on the way out of her son's bedroom and that he had been forbidden from going back into the room that is as far as the conversation went. Mrs Isaacs did not tell them to use a ladder and made no stipulation that they had to get on and repair the roof that day. That instruction had come from Mr Sneigula who as employer, was in control.

Accordingly the regulations relied upon by the claimant in this case did not apply. The WaH Regulations impose liability on non-employers only in relation to "work by a person under his control, to the extent of his control." Likewise the Construction Regulations only impose a duty on a non-employer who "controls the way in which the construction work is carried out by a person at work" to comply with the Regulations "insofar as they relate to matters which are within his control".

The PUWER regulations impose liability on non-employers if they are "a person who has control to any extent of work equipment...to the extent of his control". However, PUWER restricts such control to that which is in exercised connection with the carrying on of a trade, business or other undertaking, whether for profit or not.

Although Mrs Isaacs had imposed limits on access to her property by refusing entry to the house for the purpose of gaining access to the roof, and thereby exercised control, that was done in her capacity as an occupier. She was not as a person controlling the way in which the claimant carried out his work. She had no right to instruct the claimant in his work; that right belonged at all times to his employer. Nor would she have had the necessary knowledge or expertise to devise and direct the claimant as to the safe method of carrying out the work. Any suggestion that the employer had delegated control to the defendant was fanciful.

The true position was that Mrs Isaacs was in the position that most householders would find themselves in when arranging for household repairs to be carried out. Contractors had been engaged. It was to be hoped that they would be capable of doing a reasonably competent job and could be left to get on with it. By merely setting out areas that could be accessed, a householder was not to be taken to assume control for the contractor's employees and for the way in which those employees carried out their work. It might be different in a situation where a householder had played an unusually large role in the planning, management and/or execution of the relevant work.

Likewise there was no evidence of negligence on Mrs Isaacs' part, as there was no reason why she should have been aware that Mr Sniegula was, to use counsel's term, a "cowboy operator".

Discussion

After the decision in *Kmiecic*, which adopts a similar line to *Mason v Satelcom and Ors* [2008] EWCA Civ 494, [2008] All ER (D) 175 (May), one can expect claimants (and defendants seeking a contribution) to concentrate claims against householders on those cases which involve the state of the premises rather than on control and equipment. This approach met with success in *Intruder Detection & Surveillance Fire & Security Ltd v Robert Fulton* [2008] EWCA Civ 1009, [2008] All ER (D) 364 (Jun), where the Court of Appeal found a householder in breach of s 2 of the Occupiers' Liability Act 1957 when an employee of the Pt 20 claimant fell from an unguarded balcony. Even though the householder had warned the claimant of the danger posed by the missing balustrade, which was in any event obvious, and the fact that an experienced supervisor had been present at the time, Mr Fulton was ordered to make a 25% contribution towards the cost of settling the case.